

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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:  
STATE FARM MUTUAL AUTOMOBILE :  
INSURANCE COMPANY, :  
:  
Plaintiff, : 17-CV-05845 (MKB) (VMS)  
:  
v. :  
:  
October 3, 2019  
21ST CENTURY PHARMACY, INC., et al., : Brooklyn, New York  
:  
Defendants. :  
:  
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TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING  
BEFORE THE HONORABLE VERA M. SCANLON  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (Proceedings began at 9:31 a.m.)

2 THE COURT: Okay. So, State Farm Mutual Automobile  
3 Insurance Company v. 21st Century Pharmacy, Inc., et al., 17-  
4 CV-5845.

5 For the plaintiffs.

6 MR. MARKS: Good morning, Your Honor. Jonathan  
7 Marks on behalf of plaintiff, State Farm Mutual Automobile  
8 Insurance Company and State Farm Fire and Casualty Company.

9 MR. COOK: Christopher Cook on behalf of the  
10 plaintiffs.

11 MR. HORN: Charles Horn on behalf of 21st Century  
12 Pharmacy, Dr. Ajudua, Dr. Popa, Express Billing and Iris  
13 Itskhakov.

14 MS. STRONG: Jennifer Strong on behalf of the same  
15 defendants.

16 MR. BOWERS: Nicholas Bowers on behalf of Peter  
17 Khaim, Anturio Marketing, Inc., Logic Consulting, Inc., P&K  
18 Marketing Services, Inc., A&P Holding Group, Corp., New  
19 Business Resources Group, Incorporated and K&L Consultants,  
20 Incorporated. Thank you, Your Honor.

21 THE COURT: All right. Let me just make sure I have  
22 the docket right. So for Mr. Horn's 21st Century, Alishayev,  
23 Ajudua, Popa?

24 MR. HORN: Yes, Your Honor.

25 THE COURT: Itskhakov and Express Billing. All

1 right. Okay. But then are you on all the same -- Ms. Strong,  
2 are you on all the same ones or --

3 MS. HORN: Yes, Your Honor.

4 THE COURT: Okay. So then the docket is incomplete.  
5 You're not showing up with all of those defendants so --

6 MS. HORN: Okay.

7 THE COURT: -- you should just check with the  
8 clerk's office to make sure the entries are right.

9 Okay. So thanks for coming early. I swapped for  
10 criminal duty so here we are. All right, so let's talk. So,  
11 one is an inquiry from Judge Brody. Do you really need this  
12 motion to dismiss? Those are my words, not hers but I mean is  
13 it likely to be successful? Do you need a pre-motion  
14 conference?

15 MR. HORN: Yes, Your Honor. We do believe we'll be  
16 successful.

17 THE COURT: Why?

18 MR. HORN: I don't believe anything has changed from  
19 the inception of this litigation. I don't think there's been  
20 any discovery that has furthered their cause. In fact, I  
21 think the discovery, quite frankly, has gone the other way. I  
22 think the pleadings are insufficient. I know that discovery  
23 has nothing to do with the motion to dismiss. I'm just  
24 pointing out the rationale as to why we think this is  
25 necessary to get done. Because the way my clients are viewing

1 this case is this is the never-ending discovery request that  
2 keeps on continuing, notwithstanding the fact that nothing's  
3 being uncovered. We think the pleadings are deficient.

4 THE COURT: All right. Is there any -- well, all  
5 right. I think it's not likely -- I mean I don't know, but I  
6 know Judge Brodie has an extensive trial schedule so are you  
7 likely to get a resolution on the motion to dismiss before  
8 summary judgment because the schedule here is not going to be  
9 as long as what's proposed. So why don't you just -- it seems  
10 on your probable briefing schedule you would be close to --  
11 you know, to making the motion to dismiss a motion for summary  
12 judgment. So is it worth it to go through this exercise?

13 MR. HORN: Do you want to put the -- only because  
14 I'm at a disadvantage, I think Your Honor has a schedule in  
15 her head. Do you want to take this issue last and that way  
16 I'd be in a much better position to --

17 THE COURT: My thought is discovery here should wrap  
18 up in the middle of next year because this is a 2017 case.  
19 These issues have been floating around forever. Just got to  
20 move it. So it's a summary judgment or to be briefed -- well,  
21 that would be the pre-motion conference letter which would be  
22 sometime in the middle of the summer.

23 And you can think about it because obviously this is  
24 Judge Brodie, but I'm just asking, right, if you have a pre-  
25 motion conference in the next couple of weeks, you have a two-

1 to three-month briefing schedule and that will put you to  
2 February or March. It's unlikely, you know, with this kind of  
3 a case you get a decision unless there's something quickly  
4 dispositive, you know, shorter than a couple of months. All  
5 right. Well, you can -- you know, just think about it because  
6 looking at this schedule.

7           Okay. So we have the questions about the scope of  
8 the discovery, some of which is very detailed which I'm not  
9 sure I'm going to -- I mean I'll hear from you, but I'm not  
10 sure I'm going to decide it right now, the various back and  
11 forth about the motions to compel. A lot of talk about  
12 privilege and verification and disqualification. Would you  
13 like to talk about those in any particular order? It's up to  
14 you all. Is anything a particular priority for you to be  
15 heard on?

16           MR. MARKS: Well, from plaintiff's perspective I  
17 think we'd like to be -- our priority is our motion to compel  
18 discovery from defendants. I suspect defendants' priority is  
19 their motion to compel us but, you know, we think it probably  
20 makes sense to start with our motion to compel discovery from  
21 defendants.

22           THE COURT: Okay.

23           MR. MARKS: But we'll assume whatever order the  
24 Court would prefer.

25           THE COURT: All right. Let's look at this privilege

1 point. On the plaintiff's -- well, has anyone seen -- has the  
2 other side their retainer agreement or part of their retainer  
3 agreement? That would seem like -- or retainer agreements,  
4 plural. That would seem --

5 MR. HORN: No.

6 THE COURT: -- particularly relevant. So what's the  
7 objection to providing some or all of the retainer agreement  
8 assuming there is one at least as it dealt with this issue,  
9 right, because I mean to completely simplify this is this just  
10 the regular course of business or was this some kind of  
11 separate special investigation, research, opinion, et cetera?

12 MR. MARKS: Well, so, Your Honor, I want to make  
13 sure I'm addressing the Court's question. We have provided --  
14 as I understand defendants' motion, defendants are seeking,  
15 essentially, every privilege document on our privilege log.

16 THE COURT: Oh, right. I'm starting at the  
17 beginning which is, I think, the basis for your claim of  
18 privilege that this is not a regular course of the insurance  
19 business. And so it's in a different category and they  
20 shouldn't be allowed to see much of your privileged documents  
21 which seem to relate to well, [indiscernible] an umbrella term  
22 in investigation. Is that wrong?

23 MR. MARKS: Well, let me lay out what I understand  
24 to be the issue, Your Honor. So we have asserted privilege in  
25 the ordinary course, under the ordinary rules that typically

1 apply privilege in every single case and many of the cases I'm  
2 sure the Court confronts on a regular and routine basis.

3 THE COURT: Yes.

4 MR. MARKS: We've applied the usual, typical rules.  
5 We went through our production. We've produced over two  
6 million pages of documents. And we've asserted privilege to  
7 roughly about three hundred of them. So two million  
8 documents, roughly three hundred, and we created a privilege  
9 log and this is sort of the ordinary course of litigation and  
10 the ordinary rule of litigation. And we applied the typical  
11 rules and the typical rules are that we've got attorney/client  
12 documents and we've got work product documents. And the  
13 attorney/client documents are documents which are  
14 communications between an attorney and a lawyer for purposes  
15 of obtaining legal advice and the work product doctrine  
16 applies to documents that are prepared in anticipation of  
17 litigation.

18 THE COURT: Right.

19 MR. MARKS: Right. Okay.

20 THE COURT: Unfortunately it's not -- today we've  
21 got to move it along.

22 MR. MARKS: We've got to move fast. So basically  
23 they're claiming on exception. Okay.

24 THE COURT: Yep.

25 MR. MARKS: They're trying to -- and the exception



1 they're claiming is made of whole cloth because there really  
2 is no law to support it which is basically anything related to  
3 the verification process isn't privilege. So their theory is  
4 Kattan and other lawyers worked on verification and because  
5 they participated, conducted, in some way were involved in  
6 verification, I don't know what they mean, but they say  
7 because we were involved in verification, therefore, bam,  
8 privilege gone. Okay.

9           There's no law that supports that anywhere. It  
10 doesn't exist. There's not a case that supports it and if it  
11 existed, it would completely undermine the relationship -- it  
12 would, first of all, destroy the existence of a relationship  
13 for insurance companies because insurance companies are in the  
14 business of doing insurance. And if when they did insurance  
15 business they couldn't have a privilege when they did  
16 insurance business, there would be no privilege. In fact, it  
17 would wipe out the privilege for all businesses because any  
18 time a business did its own business, it would be doing  
19 business and, therefore, it couldn't have a privilege. It'd  
20 wipe out the privilege.

21           THE COURT: Well, I don't know if that's the best  
22 argument because that is exactly the problem in the insurance  
23 world, right? Is it in the ordinary course of business where  
24 you're evaluating a claim then even if you have to consult  
25 counsel that may not be privileged. It depends on reason why

1 you're doing that but --

2 MR. MARKS: Well --

3 THE COURT: -- anyway, let's talk about this  
4 verification and what you think it is and --

5 MR. MARKS: Sure. So here's the important  
6 distinction, Judge, okay. If a lawyer goes out and inspects a  
7 broken car and writes a report or if a lawyer walks through an  
8 arson site and collects samples and writes a report, okay,  
9 that's not privilege. That's a lawyer doing the  
10 investigation, okay. Standard makes sense. Lawyer doing  
11 investigation, okay.

12 But if an insurance company is doing its work  
13 verifying a claim and it gets advice from a lawyer saying  
14 these are the circumstances under which you compared my claim.  
15 That's privilege. And the law is pretty clear that just  
16 because you're doing claim work doesn't mean you lose the  
17 privilege, okay. So what is it? What's the most that they  
18 can point to that we did here, okay. What did we do? We took  
19 an EUO. That's a deposition.

20 THE COURT: Right.

21 MR. MARKS: Okay. All right. And we sent a letter  
22 to the lawyer of the deponent, of the person that's being  
23 EUO'd and saying thank you for the EUO. Now you need to send  
24 us some documents because the EUO wasn't sufficient. And who  
25 do we send that lawyer to? From lawyer to lawyer. It is the

1 routine practice in New York for lawyers to represent  
2 insurance carriers in connection with the EUO process, in  
3 connection with the verification process. Lawyers are part of  
4 that process. They're representing clients in the  
5 verification process.

6 THE COURT: Okay. Is there a retainer agreement for  
7 that work? That would just clearly state that, you know,  
8 we've been retained to represent you in the verification  
9 process, potentially leading to litigation in state court or  
10 not?

11 MR. MARKS: I think that --

12 THE COURT: I mean if there's not, there's not but  
13 that would seem like the easiest, quick summary of your -- the  
14 work that was done.

15 MR. MARKS: I don't --

16 THE COURT: You know, work that was anticipated to  
17 be done.

18 MR. MARKS: Well, Your Honor, I don't think there is  
19 and I don't think the retainer agreement says that.

20 THE COURT: Okay.

21 MR. MARKS: And the attack, too, is -- as to  
22 [indiscernible]. I think the attack is to other lawyers that  
23 had -- that were sort of representing in the course of  
24 verification. Remember it's their --

25 THE COURT: Yeah, the leader attorney is lower in

1 the time line, right, of work done on these cases, right?

2 MR. MARKS: Right.

3 THE COURT: I mean you're at the point where you're  
4 like wait a minute, look at this overview. We think there's a  
5 big problem here. These are more -- at least seemingly more  
6 individual case driven even if, you know, you're starting to  
7 suspect there's a bigger problem.

8 MR. MARKS: Well, well, there are a couple of  
9 things. So there's the work associated with the larger  
10 investigation, right, which is clearly in anticipation of  
11 larger litigation.

12 THE COURT: Right.

13 MR. MARKS: So you've got to separate out some  
14 investigation --

15 THE COURT: Right.

16 MR. MARKS: -- from other investigation. One of the  
17 things that they haven't attempted to do is you got to break  
18 them apart. But the other piece of this is that one of the  
19 things we have to be very careful about is if suddenly a  
20 lawyer taking the EUO and sending a letter and representing a  
21 client in verification wipes out that privilege, I mean that's  
22 going to reek havoc on the way in which verification is  
23 conducted in New York because lawyers routinely represent  
24 insurers, in fact, deal with -- they're dealing with Mr.  
25 Horn's partner. That's how this works.

1           Lawyers are taking EUO's every single day. If  
2 suddenly a lawyer taking an EUO wipes out the privilege, it's  
3 a fundamental altering of the law. I mean idea that simply  
4 because a lawyer is involved in some way in the verification  
5 process, that wipes out the privilege. It would be the  
6 fundamental altering of the way in which verification is  
7 conducted in New York and a fundamental change in the  
8 privilege law in the State of New York.

9           THE COURT: My question then really of all this  
10 paper is is there something that gives an indicia that there  
11 was a separation between the regular course of business and  
12 the insurance company and the lawyers and basically -- well,  
13 the verification process which is the beginning of  
14 investigating certain claims and it seems, I heard about this  
15 from a variety of cases, it seems there's part of it is a  
16 spot-check. We're just going to check in every so often and  
17 see if there's a problem. That's really what the insurance  
18 companies are looking for. And some of it is we think there's  
19 a problem or this claim, in and of itself, is problematic and  
20 they start to deal with counsel.

21           So, you know, if it's -- if there's something that  
22 describes that's either the timeline or the relationship that  
23 instead of having to look at all these documents, we could  
24 group them together and say look these are this kind of  
25 document, these are the Katten documents and from your

1 perspective, you know, there's a privilege across the board.  
2 There's just not so much information here about how one goes  
3 from the insurance company to the lawyer's involvement.

4 MR. MARKS: And, Your Honor, and I think I --  
5 unfortunately, I don't think we're going to find -- what I  
6 think the Court is thinking about and I would agree, it would  
7 be wonderful if it existed, if there were a silver bullet. If  
8 there were one document that we could pull out and say look,  
9 we'll, we'll show them this document and this will clearly  
10 show, look, that Katten wasn't walking the arson site  
11 collecting samples, Katten was providing legal advice or  
12 Katten wasn't inspecting the car and writing a report. It was  
13 giving lawyerly advice and counsel, okay. And I wish there  
14 were a silver bullet that I could point to to do that.

15 Unfortunately, I think the way this is going to lay  
16 out is is we've got documents and if you at each one of those  
17 documents you'll see --

18 THE COURT: I'm trying to avoid that.

19 MR. MARKS: I know. I know. So let me go -- what  
20 you'll see, I think, in those documents is that it's sort of a  
21 negative, right? We're sort of probing the negative which is  
22 none of them involve that. I mean I can tell you that, for  
23 example, Katten doesn't make a claim decision. Okay. It  
24 doesn't decide whether to pay or deny a claim. There's no  
25 instance of it stepping over the line, okay.

1 But one of the things that may be sort of relevant  
2 to this is them taking a deposition, right? And I would say,  
3 too, that to ask -- to put the burden on us is sort of not,  
4 not the way I would think it ought to play out, right? Well,  
5 they're the ones who are saying, look, you crossed the line  
6 here and the most that they can say about us crossing the line  
7 is Katten was involved, Katten handled, Katten participated.

8 THE COURT: But the obvious problem is they don't  
9 have the documents which is why, you know, I'm talking to you  
10 first even if they're the ones who want the papers.

11 MR. MARKS: And I'll tell you that what you have to  
12 accept I think is the rules that sort of govern the ordinary  
13 course of the assertion of privilege, right. And what I can  
14 tell you is that when we asserted a privilege, first of all,  
15 there are documents that don't have anything to do with  
16 verification. Put those aside, we've asserted the privilege  
17 as to those, and they don't get those at all. Those aren't  
18 even at issue here.

19 And then I think you have to accept that, look,  
20 we've created a privilege log and if you take a look at the  
21 privilege log, the privilege log is our best -- that's how it  
22 works is they take a look at our privilege log and say, all  
23 right, what on our privilege log -- and that they haven't done  
24 is to say look, what on a privilege log actually points to  
25 something that suggests that we've stepped over the line, that

1 we've done an investigation?

2           And if what's necessary is that we need to go back  
3 and do a more fulsome description of particular documents or  
4 they can point to particular documents so that maybe we can  
5 limit the in-camera review if there has to be an in-camera  
6 review. I mean maybe that's the way to do it is maybe what  
7 we're talking about is if, look, they can point to specific  
8 documents and say, look, these are the specific documents that  
9 we think may have crossed the line, right, some fraction of  
10 the 300 that crossed the line. Maybe in that scenario, then,  
11 you know, they we can say all right, here's 40 documents,  
12 here's 50 documents that reflect crossing the line.

13           These are the documents and maybe as to those we can  
14 either do a more fulsome privilege log, option A. Or option  
15 B, if a more fulsome privilege log isn't enough, than maybe  
16 there's a narrower group of documents to which the Court can  
17 do an in-camera inspection. Again, I don't want the Court to  
18 have to -- the last thing I was is for the Court to have to  
19 inspect 300 documents. But if maybe, again, we shift the  
20 burden a little bit and say look -- but what we can't have is  
21 this sort of wholesale idea that because Katten took an EUO  
22 and sent a letter in connection with an EUO, that every  
23 communication with Katten gets wiped out. That certainly  
24 can't be the case.

25           What we're really talking about is how do we narrow



1 the scope and define what it is we're looking for. And I  
2 guess what I'm offering is, you know, have them take a look at  
3 our privilege log, have them identify, maybe by time, maybe by  
4 description, a subset of documents that they believe reflect  
5 us crossing the line.

6 We'll offer maybe a more fulsome description than a  
7 privilege log and if that's not satisfactory than we have a  
8 smaller set that we could ask the Court to conduct an in-  
9 camera inspection on.

10 THE COURT: Okay. All right. Then flipping it, why  
11 do you need the information from them?

12 MR. HORN: May I?

13 THE COURT: From the lawyers. Yes.

14 MR. HORN: Very quick chronology. We asked for  
15 these documents well over a year ago. It took a year for us  
16 to get the documents. Then when we got the documents, they  
17 claimed a whole, [indiscernible] privilege. So all the  
18 representations about how they're, you know, assessing to what  
19 they think of these privileged documents they, quite frankly,  
20 don't mean a thing to us. My client was waiting for these  
21 documents. Six months after they turned them over  
22 mysteriously, after we made the motion to compel, another 150  
23 became unprivileged and they said, okay, you can see these.  
24 But here --

25 THE COURT: So you went from 450 privileged to 300?

1 MR. HORN: Yeah. There's still 500-some-odd  
2 documents they refuse to turn over due to privilege. But here  
3 is really the thing that I -- and I'm going to just Mr. Marks  
4 and I will diverge on. It is the normal practice of insurance  
5 companies not to use the same litigation counsel as they use  
6 for verification counsel.

7 THE COURT: No.

8 MR. HORN: So that was just not correct what he said  
9 and I know that because we're in this business. What State  
10 Farm has done now is they've basically said uh-uh-uh, you  
11 know, Mr. Marks's firm, they have law licenses. So you're not  
12 allowed to get the very documentation that you need. They  
13 have an obligation under the law not to be adversarial with us  
14 during verification. They cannot throw up this, whoa, we're  
15 not going to let you know what we were thinking.

16 Another thing, too, that State Farm should consider,  
17 should the Court consider precluding them from putting  
18 anything in regarding justifiable reliance? Because if  
19 they're not going to tell us what they knew --

20 THE COURT: Yeah.

21 MR. HORN: -- when they knew it, then that's another  
22 option for this Court. As much as I understand that as  
23 lawyers would chafe at the idea of attorney/client privilege,  
24 if that's something that is sacrosanct, it cannot be used as a  
25 sword by State Farm and that is exactly what they did here.

1           Mr. Marks and his firm have been involved  
2 personally, the very attorneys who have appeared here are the  
3 ones who are personally involved since 2013 is the first  
4 entry. More activity in 2015. There's 38 pages of a  
5 privilege log, 38 pages.

6           THE COURT: Let me ask you've litigated -- you all  
7 have litigated these cases. I agree, but I don't usually see  
8 the same attorneys having been involved in the -- earlier in  
9 the development of the claims? Being the ones bringing these  
10 RICO and fraud claims. So just drawing on your experience in  
11 other cases, does this issue then come up or do you get the --  
12 have you gotten the verifications, the like, even if there was  
13 counsel involved?

14           MR. HORN: First, it's only come up once before with  
15 me.

16           THE COURT: Okay.

17           MR. HORN: And it was resolved before we got to that  
18 stage.

19           THE COURT: Uh-huh. How about you, Mr. Bowers?

20           MR. BOWERS: It depends. I've been doing this since  
21 2011. I very rarely have seen -- I haven't seen this  
22 privilege log but I rarely -- this volume is unusual.  
23 Generally, and without going into specifics, there is one  
24 particular law firm that represents plaintiff insurance  
25 companies and these and also does claim-stage stuff. From

1 that firm, I recently was on a case where we -- similar amount  
2 of documents were turned over, millions of pages. The  
3 privilege log was maybe 15 to 25 documents. There are  
4 privilege fights in discussions but to this extent, I haven't  
5 -- aside from counsel and aside from State Farm, I haven't  
6 seen it.

7 THE COURT: Was there a decision in that case by the  
8 judge?

9 MR. BOWERS: We didn't challenge the privilege  
10 because according to the law, it was pretty --

11 THE COURT: It was much smaller?

12 MR. BOWERS: -- it was small. Well, no, the case  
13 was larger but because the log was smaller.

14 THE COURT: No, no. The number of privileged  
15 documents.

16 MR. BOWERS: Yeah, and it was resolved between us.  
17 It was resolved between the parties, I'll just say that and  
18 there was no motion practice.

19 MR. HORN: And if I may, Your Honor, just so you  
20 understand the true landscape of this. So then what the next  
21 stage of the game was we said, okay, you've identified two  
22 individuals and we identified a third in your Rule 26  
23 disclosure. We'd like their depositions. Then the answer was  
24 they don't work here anymore and this was, you know,  
25 discussions between counsel.

1 I said, well, can you give me the last known and  
2 they had said, well, let's find out whether we're going to be  
3 representing them and everything else. And through  
4 discussions with counsel, it was -- one of the things that we  
5 discussed was, hey, what about a Rule 36(b)(6) witness, that  
6 way you can get this information which I was hoping to be able  
7 to glean information regarding this representation, et cetera,  
8 and everything else.

9 The problem was we didn't get our objections.  
10 They're not going to answer anything to do with justifiable  
11 reliance so I am literally flying in the blind and the thing  
12 that really is bothersome and I know this doesn't -- it isn't  
13 a substantive argument, but the thing that really is  
14 bothersome to my client is they're asking for everything under  
15 the sun and they won't turn over the very information that is  
16 critical. And of all this referencing of one million  
17 documents is nonsense. That's claim files and everything  
18 else. The meat and potatoes, they don't want to turn it over  
19 and I suspect they don't want to turn it over because they  
20 realize they have critical problems with this case.

21 They're going to have to explain why it is they were  
22 paying claims after this litigation started and now they want  
23 to get paid their money back. They're going to have to  
24 explain why it is they never raised all of this fraud defense  
25 in arbitrations where they were actually fighting over this

1 and why res judicata doesn't apply.

2 I need to know what they knew, when they knew it and  
3 I know, I can see from the privilege log, this law firm has  
4 been involved from jump street. How it is they think they can  
5 tell the defendants after they brought this lawsuit that we're  
6 not going to tell you what we knew and when we knew it during  
7 the verification process is ludicrous. And all of this  
8 attempts by counsel to say well, we can subdivide and  
9 bifurcate everything else. I wasn't the one who decided to  
10 use the same lawyers for litigation and verification and I  
11 don't have the burden to decide what it is. They made that  
12 decision. They opened this door.

13 If they were so worried about the attorney/client  
14 privilege, they should have taken steps to protect it and not  
15 use it to abuse us and abuse this Court and this lawsuit by  
16 saying, yes, we're going to bring a lawsuit but we're not  
17 going to give you any of the information you need to defend  
18 this case.

19 THE COURT: So let me just -- so can you just  
20 explain a little bit more for the record? Assume you got some  
21 information about what they knew, when they knew it, how do  
22 you anticipate that would affect your defense?

23 MR. HORN: Well, if they -- if their argument is we  
24 didn't know about this, therefore, we were voluntarily paying  
25 claims.

1 THE COURT: Right. Right.

2 MR. HORN: Once it's determined they knew, and we  
3 have since 2013, there's entries from 2013. If you knew in  
4 2013, how are you claiming justifiable rise of anything, but  
5 what did you know in 2013, '14, '15 and that includes the  
6 conversations with your lawyers who were actively taking part  
7 in this investigation?

8 Another thing that was represented here that is just  
9 such gilding the lily, you know, all it was was a deposition.  
10 No, it wasn't. They did the EUO. They were the ones that  
11 were reviewing all of the verification questions. They did  
12 all of the verification process, all of it. They were the  
13 front guy. You can't be both. You can't say uh-uh-uh, got a  
14 law license, you don't get this information. The law is  
15 clear. Court of Appeals in New York, the law is crystal clear  
16 that they cannot hide behind that shield. And putting it in  
17 the vernacular, you can't ride two horses with one butt. You  
18 can't be both. You can't be --

19 THE COURT: I haven't had that one presented, but --

20 MR. HORN: -- investigative lawyer -- you know, you  
21 can't be both and you can't pretend, oh, no, now I'm wearing  
22 my lawyer hat. And the representation that there's no case  
23 law, we cited all the case law. There's tons of case law that  
24 tell you, that put these carriers on notice. Don't play  
25 around with the attorney/client privilege. Don't put lawyers

1 in positions where they don't need to be. That's the problem  
2 here.

3 So I can submit to this Court without any  
4 exaggeration if we don't get the documents requested, we  
5 cannot defend this case because we don't have any of the  
6 information we need. The only things they gave us is the  
7 things that we could have figured out ourselves. It'll just  
8 be a fight over medicine at the end. But if I don't know when  
9 they knew it and who knew it and that means actually probing  
10 it because it's not something that they're just going to  
11 volunteer, hey, I knew it.

12 We're going to need to take -- if it's a  
13 conversation we're gong to need to speak to both people within  
14 that conversation to get who said what to whom to verify it.  
15 They've left us completely impotent to defend this case and  
16 they've taken the position now -- and it was brilliant  
17 lawyering, brilliant lawyering on Mr. Marks' part and another  
18 reason I have the utmost respect for him and his firm, to now  
19 change the narrative to go I'm the bad guy because I'm asking  
20 for the very thing they need to prove their case.

21 THE COURT: Yes, your reply?

22 MR. MARKS: The way that the -- there's a lot of  
23 throwing around of things there. There's mixing of ideas,  
24 there's sloppy analysis. And at the end of the day it's going  
25 to do great damage to the attorney/client privilege if it's



1 allowed to prevail and so I need to break it into pieces.

2 Otherwise, we've got a mess on our hands here. And let me  
3 break it into pieces, okay.

4 Let's start, first, with this concept of reliance,  
5 okay. When you talk about reliance, absolutely we have to  
6 prove reliance. No question about it. And in any ordinary  
7 case the defendant in a reliance scenario would love to know  
8 what did the lawyer communicate with his or her client about  
9 what did you know when you knew it, okay. But that doesn't  
10 allow you to break the attorney/client privilege and say what  
11 did your lawyer know when you made a decision about something  
12 or whether you relied or didn't rely. This is an ordinary  
13 scenario.

14 The place to figure out whether there's reliance  
15 isn't to ask what did Katten Muchin know, what did Katten  
16 Muchin figure out. You don't ask the lawyer in a fraud case  
17 what it knew about reliance. You ask the client. They  
18 haven't deposed a single one of our witnesses. They haven't  
19 sat down and looked -- they throw around, oh, it's only two  
20 million pages.

21 The decisions in each one of the claims, there is a  
22 claim file. The claim file is where the decisions are made  
23 about whether to pay or deny a claim. That's where you look,  
24 okay, and that's where you're going to see. They haven't  
25 spent the time to do it. They've thrown this up against the

1 wall because for reasons we believe that are tactical. They  
2 could take a look at those documents and then sit down and ask  
3 the client, ask State Farm what did you know and when did you  
4 know it.? And if we can't answer that question then it's on  
5 us. We've got to prove it with our witnesses, State Farm  
6 witnesses, and that's what matters.

7 Now a State Farm witness can't say I relied and  
8 can't establish its reliance through it's own witnesses. Then  
9 that's State Farm's problem. But you don't get to bust the  
10 privilege. You can't claim, oh my god, I can't do it.

11 And what is it really that we're talking about that  
12 we haven't -- or he said the documents I can't have. I've  
13 never seen anything like it that they're hiding behind. We  
14 have produced a significant volume of material here. We've  
15 produced the MCIU file. This is the file that they think is  
16 the heart of this thing. We've produced 91 percent of it,  
17 okay. The file that's this treasure trove, he's got 90 --  
18 31,000 pages of that file they've got. We've asserted the  
19 privilege as to 300 pages, 300 documents of which many, many  
20 are post litigation documents which means after this lawsuit  
21 started.

22 So he says in most cases, he's seen 50, 20. Many of  
23 these are post litigation in this litigation. Now, he says  
24 okay, next, what's the terrible thing that he claims that we  
25 did? We had the same lawyer that took the EUO and sent the

1 letter who's representing State Farm in this case, okay. That  
2 happens. It's happened with other law firms. But that  
3 doesn't wipe out the privilege. We can represent State Farm  
4 doing this, we can represent State Farm that, we can represent  
5 State Farm's CEO in a fight with their neighbor over a dog  
6 bite. If you don't -- the privilege analysis, what we  
7 represent them in, the number of different matters in which we  
8 represent them in, if we're doing them in different things,  
9 it's not relevant to whether there is or is not a privilege.

10 Now, there may not be a privilege. You've got to  
11 look at whether there's a privilege in particular  
12 circumstances. And it may be that you look at the privilege  
13 in a particular circumstance and it doesn't exist, but you've  
14 got to drill down and do the analysis. Is there a privilege  
15 in a particular circumstance? And it doesn't disappear simply  
16 because the lawyer may have represented them in something  
17 else.

18 Then he throws around and says State Farm did all of  
19 the verification. There is absolutely no support for that  
20 whatsoever. The only thing that they can suggest is that  
21 Katten acted as lawyers sometimes act representing a client in  
22 the verification process by taking an EUO and sending a  
23 letter, and that's what they've done and that's what they've  
24 pointed to and that's it. The burden's on them to come  
25 forward and say that there's something else that wipes that

1 out.

2 And so you've got to take a -- now, they say we've  
3 got all this case law. Well, there is no case law that says,  
4 one, if a lawyer represents you in verification in a case you  
5 waive the privilege. No case law. There is no case law that  
6 says if you're involved in verification, there is no  
7 privilege. No case law.

8 The case law that there is, the case law that they  
9 say, the mountains of case law, is basic case law that this  
10 Court is familiar with, which I think the Court started with  
11 which is if a lawyer does something that's not lawyerly,  
12 there's no privilege. We agree. That's not a remarkable, you  
13 know, profound principal of law, okay. And there's the word  
14 product law which is the activity has to be in anticipation of  
15 litigation.

16 But if you take a look at our law, take a look --  
17 well, take a look at what we've asserted privilege to and even  
18 if -- and if you take a look at the documents, we have  
19 asserted a privilege consistent with that.

20 Now, he says I suddenly wait -- I waited a long time  
21 for these documents and then I got a -- part of why took time  
22 was because we had to do a privilege log and we did send them  
23 additional documents, and the reason we did was this. We knew  
24 there was going to be a privilege fight. So we went back and  
25 we said you know what, we're going to be extra, extra careful.

1 We're going to apply the very strict rules. If this doesn't  
2 pass the very strict -- we know there's a chance that we may  
3 wind up with an in-camera inspection and we don't want to be  
4 embarrassed ,as you might imagine.

5 And so we went back and said, you know what, this  
6 one I might be embarrassed if the judge were to take a look at  
7 this one and so we said, you know what, we're going to send  
8 than one over and that's what we did. And so what you'll see,  
9 what we believe is we have a highly scrubbed, carefully  
10 prepared privilege assertion. And so if they want to  
11 challenge privilege assertion, get down into the weeds and do  
12 your work and don't throw around things like same lawyer did  
13 this, same lawyer did that, all verification is waived, I need  
14 reliance, there's no way I can prove my case unless I see the  
15 privileged communications between the lawyer and the client.

16 Well, if that were the case, that would be the end  
17 of privilege, frankly, in every fraud case that depends on  
18 reliance. Of course you'd love to see that stuff. We can't  
19 go there. That would be unfortunate. And make no mistake,  
20 this is -- this would reek, this is a fundamental change in  
21 the law for which there is absolutely no support.

22 THE COURT: Anything else?

23 MR. HORN: Just very briefly, just a bit of  
24 clarification. Some of these documents that they did a fine  
25 scrub, they're actually transcripts of EUOs that were held

1 back on privilege previously. And as far as something the  
2 Court should be aware, when -- these are two distinct periods,  
3 verification and -- they continued doing verification.

4 THE COURT: Right.

5 MR. HORN: They're with the client even afterwards.  
6 That is -- you know, and we can waive the attorney/client flag  
7 around all we want but at the end of the day, State Farm  
8 should have known better and they can't have it both ways.  
9 They can't have the statutory requirement of my clients  
10 cooperate with them during the verification process and then  
11 bring a litigation against them, use the same lawyers, and now  
12 claim privilege, I don't have to tell you anything.

13 THE COURT: Okay. On the motions to compel, have  
14 you worked out any of this?

15 MR. MARKS: I think we have, Judge.

16 THE COURT: Okay.

17 MR. MARKS: I think the list is shorter.

18 THE COURT: Okay.

19 MR. MARKS: I don't know how -- I mean I'm not sure  
20 how much time we have to argue but why don't I tell you what  
21 the list is at least?

22 THE COURT: Okay. We have about 20, 25 minutes. So  
23 this is what's left or what's been eliminated?

24 MR. MARKS: I can give you what's left. That's the  
25 list I have.

1 THE COURT: Okay.

2 MR. MARKS: Is that -- would that be helpful?

3 THE COURT: Yeah.

4 MR. MARKS: And then you can decide what you want to  
5 argue. So there's been a bunch of letters but I think, I  
6 think this is what I understand to be left about which there  
7 is disagreement. I think a couple of these things we may be  
8 able to address quickly now.

9 Item 1 is 21st Century. We just need simple  
10 interrogatory answer that says these are 21st Century's bank  
11 accounts and we need it verified. There's been some back and  
12 forth, look at the documents, we told you, there's this,  
13 there's that. I think it just could be simply summed up to  
14 say these are the bank accounts, I verify it, I got no others.  
15 That's the simplest way and then we don't have to file e-mails  
16 back and forth to each other and that's one.

17 The next is Mr. Alishayev. We need simply a sworn  
18 e-mail interrogatory response from him in which he says these  
19 are my e-mails addresses, these are my phone numbers. During  
20 his deposition he was able to identify one e-mail but he was  
21 confused about whether he used others or not or which e-mails  
22 he used. There are e-mails that may be his or may be other  
23 people's and we need to just know which ones are his and which  
24 ones did he use and which phone numbers are his and which ones  
25 are -- he didn't know, in his deposition, but that's something

1 he could probably figure out. Again, just this one response  
2 saying these are my e-mail addresses, these are my phone  
3 numbers. Swear it.

4 The next category is we need personal bank account  
5 records of Alishayev and Ajudua and personal tax returns of  
6 Alishayev and Ajudua. Now those are --

7 THE COURT: Why do you need those?

8 MR. MARKS: Well, these are two categories I suspect  
9 we're probably going to have a fight about. But let me tell  
10 you what our theory and view is on the personal financial  
11 records of these two individuals, and the theory is a little  
12 bit different as to each, Your Honor. And I'll try to be  
13 brief because I know we're running short on time.

14 I'll begin with the amended complaint. It is State  
15 Farm's theory that there are a number of significant financial  
16 -- that the scheme works through financial, elaborate  
17 financial transactions and there are two parts of the scheme  
18 that are important. One, the secret ownership and control of  
19 21st Century. It's not just owned by Alishayev, it's owned by  
20 The Management Group which is four individuals.

21 THE COURT: So now this is, sorry, I'm blanking.  
22 What's the doctor cases?

23 MALE: Malela [Ph.].

24 THE COURT: Thank you, Malela. So this is almost a  
25 Malela-type argument?



1           MR. MARKS: It's not quite Malela, Your Honor,  
2 because --

3           THE COURT: Okay.

4           MR. MARKS: -- it's not illegal for lay people to  
5 own a pharmacy.

6           THE COURT: But the structure that we keep seeing in  
7 those cases?

8           MR. MARKS: Yeah.

9           THE COURT: Okay. All right.

10          MR. MARKS: We've got a complex structure here.

11          THE COURT: Okay.

12          MR. MARKS: And part of how we believe that control  
13 was exercised was through money moving in and out of what we  
14 label as -- what we call in the complaint shell companies, I'm  
15 sure the defendants will call them something else. We call  
16 them shell companies.

17          THE COURT: Yeah.

18          MR. MARKS: And some of these shell companies are  
19 now defendant.

20          THE COURT: Uh-huh.

21          MR. MARKS: And we've got, Your Honor, literally  
22 millions of dollars moving back and forth, going back and  
23 forth, in and out, okay.

24                 The other piece of it is we now have really at the  
25 Court's suggestion merging, we've now explicitly alleged

1 kickbacks, okay.

2 THE COURT: I did not urge you. I said you had not  
3 done it so your connections were weak on looking for other  
4 information but, okay, yes, the kickbacks. Yeah.

5 MR. MARKS: So we have financial arrangements and I  
6 will tell you --

7 THE COURT: Right.

8 MR. MARKS: -- that, you know, they will take the  
9 position that our evidence isn't good. Our evidence has  
10 gotten really, really good on the kickback story and we have  
11 some very blatant instances of kickback payments. And, in  
12 fact, one of the startling things about Mr. Alishayev's  
13 deposition was when asked is X a kickback payment, right, or  
14 did so-and-so make a kickback payment so you can get  
15 prescriptions, his answer wasn't absolutely not, which is what  
16 you'd think a defendant would say in that circumstance. It  
17 was I don't know, sort of an interesting answer particularly  
18 in a case like this.

19 But the ways in which these were affected was  
20 through the -- part of it was the movement of money and the  
21 money moves, it's passing back and forth through these shell  
22 companies and we see it. So, for example, there's a company  
23 that's owned by Alishayev's father, okay, called Personal Tech  
24 and the money's going back and forth and it's passing through  
25 these to pay the kickbacks and also to get to marketers. It's

1 passing back and forth through the marketers.

2           So you got the money, nobody's paying it directly.  
3 It's moving, right. And so our point is is you've got a lot  
4 of money that's moving around, okay. So that's point one  
5 that's important. And part of these entities is to hide this  
6 movement of money.

7           THE COURT: And you think -- you are saying both  
8 Alishayev and Ajudua use their personal bank accounts for some  
9 of these movements of the money tied to either version of  
10 these schemes, the kickbacks, the group ownership which, you  
11 know, may all be tied together anyway. Is that what you  
12 believe?

13           MR. MARKS: We do and we do for a couple of  
14 important reasons. One of the things that Alishayev have  
15 testified to, which is sort of important, is that he basically  
16 said, look, he has other entities that he owns, right.

17           THE COURT: Right.

18           MR. MARKS: But he admitted, in his deposition,  
19 these other entities that I own, they didn't do anything.  
20 They didn't have employees, they didn't do any business, I  
21 just owned them. And what do they do?. He didn't know? In  
22 other words, the only business or occupation he had when he  
23 operated 21st Century was 21st Century.

24           THE COURT: Those are my interns. You can come on  
25 up. Sit up here.

1           MR. MARKS: In other words, he more or less  
2           acknowledged that these were companies through which he was  
3           passing money for whatever purpose, okay. So that's  
4           important. The other thing he sort of acknowledged in his  
5           deposition are that the general ledgers that we --

6           THE COURT: Right. That they're not accurate.

7           MR. MARKS: That they're not accurate.

8           THE COURT: Okay.

9           MR. MARKS: So we can't rely on the corporate  
10          documents of 21st Century. So we've got money moving and that  
11          there are transactions that are going to him that are  
12          characterized as business events, some of which he said were  
13          personal, that he got for personal purposes. So we've got  
14          money moving around, we've got this money moving around as  
15          part of a scheme, and we've got these entities that don't do  
16          anything, that he admits he's sort of moving money through and  
17          so you connect all that together and keep in mind that  
18          Alishayev is now a named member of an association of fact,  
19          RICO Enterprise.

20          THE COURT: Okay. So what's the information about  
21          Ajudua's personal accounts?

22          MR. MARKS: Sure.

23          THE COURT: Because I'm looking at the letter --

24          MR. MARKS: Yes.

25          THE COURT: -- on the docket at 188 which --

1 MR. MARKS: Yes.

2 THE COURT: -- includes a lot of what you just said  
3 but what about Ajudua?

4 MR. MARKS: Yes.

5 THE COURT: He has a statement about not really  
6 knowing where his money's going --

7 MR. MARKS: Yes.

8 THE COURT: -- but what about the personal accounts?

9 MR. MARKS: Yes. So Ajudua, Your Honor is  
10 absolutely correct. The analysis under Ajudua is different  
11 and the reason the analysis, Ajudua is a doctor. So one of  
12 the ways in which we think prescriptions were generated was  
13 because people controlled clinics, they controlled locations  
14 and they made the prescriptions happen out of that location.  
15 And we believe that happened at the clinics that Ajudua  
16 controlled. He controlled it probably four where these --  
17 didn't control, he worked at four where these happened, okay.  
18 He's got four clinics.

19 And one of the things that was striking about  
20 Ajudua's testimony is that of these four professional -- now,  
21 these are Melela, this is the Melela situation. There are  
22 four professional corporations that he owned on paper.

23 When he -- he said two important things. He said  
24 there are prescriptions with my name on them that I didn't  
25 sign, okay. So somebody's signing my prescriptions and I

1 think, he's speculated --

2 THE COURT: The officer person.

3 MR. MARKS: The office, meaning the lay person who's  
4 running the clinic, right, and enormous amounts of money. He  
5 was confronted with probably over seven figures in money  
6 that's moving out of his professional corporations that he  
7 said I've never seen that before, I don't know about that, I  
8 didn't authorize it. He looked genuinely shocked at the  
9 amount of money that was going out of his professional  
10 corporations without his knowledge.

11 He also said he had not actually seen the corporate  
12 tax returns of his own professional corporations other than  
13 the first year and had not seen the general ledgers of his  
14 professional corporations before. So we don't know how much  
15 money he actually got, how much money went to him and that's  
16 important because it shows really the extent to which he  
17 actually controlled, he actually was in -- because that  
18 relationship between how much he gets and how much other gets  
19 is critical to this.

20 THE COURT: Do you have money going to him?

21 MR. MARKS: We have some money going to him but we  
22 don't know -- we don't know, ultimately, how much he  
23 ultimately gets because he doesn't know. Frankly he has no  
24 idea. He kind of threw up his hands, as I said, and he was  
25 sort of shocked and surprised at how little he is actually --

1 how much was going to other sources and --

2 THE COURT: All right. So you want their -- each of  
3 their bank records. What about the tax records? You were  
4 talking about the tax records, their personal and their dual  
5 tax records?

6 MR. MARKS: Yes. The tax records, the analysis,  
7 Your Honor, is similar and it's for the same reasons in part  
8 because, number one, we cannot rely on any of the corporate  
9 documents that we've seen either from 21st Century or from the  
10 clinics. We can't rely on their corporate tax returns or  
11 their general ledgers because of what we basically heard in  
12 the testimony. That's important.

13 The other thing is is that we want to see,  
14 essentially, now -- you know, what they declared, what they  
15 claimed that they received. And there is, and particularly in  
16 addition the case of Alishayev a tax component to some of what  
17 he was up to. So, for example, one of the elements of this  
18 scheme is that some of these shell companies that are, we call  
19 shell companies, they're supposedly disconnected from each  
20 other, are all making similar payments at the same time.  
21 Alishayev testified he didn't know why that was happening.  
22 Maybe it's a coincidence.

23 THE COURT: Similar in what way? The same amount of  
24 money that's going out to --

25 MR. MARKS: Two of the same people about --

1 THE COURT: Okay.

2 MR. MARKS: -- the same time.

3 THE COURT: Okay.

4 MR. MARKS: Okay. And on the corporate tax returns  
5 some of these are being characterized as business expenses and  
6 during his testimony he claimed some of them were intended to  
7 be compensation for him, okay.

8 Now if they were claimed as compensation how did he  
9 treat them on his tax returns? Were they compensation, were  
10 they business expenses, what really are the nature of these  
11 payments that we believe are, in fact, in furtherance of the  
12 scheme and, in fact, frankly, what are the nature -- how is he  
13 characterizing the payments that he's making to all of these  
14 various, what we believe are, shell companies. And that, of  
15 course, is important to show what these transactions are and  
16 how they're, in fact, furthering the scheme.

17 THE COURT: Okay. So what else -- all right. So we  
18 have -- you want the 21st Century interrogatories of the bank  
19 accounts, you want Alishayev's sworn response about his e-  
20 mail, you want the bank records for Alishayev, Ajudua and  
21 their tax records. What else is open?

22 MR. MARKS: There's another general category and it  
23 encompasses a variety of different requests, but it's what  
24 I'll call Alishayev's other businesses, right. So we seek  
25 records related to his other businesses. And the Court had



1 previously ruled under the original complaint that if it was a  
2 different business, off limits, and that certainly made sense  
3 and we understand that ruling and that ruling made sense at  
4 the time. But particularly given Alishayev's testimony that  
5 he really didn't have any other businesses, that during the  
6 time that he was operating 21st Century all these other  
7 entities, they didn't have employees, they didn't do any  
8 business. In some instances he sort of really didn't even  
9 remember them or know what they were doing.

10           There really is no other business or occupation.  
11 That any other entity that he is operating are, in fact, part  
12 -- there's money moving in and out of them from 21st Century.  
13 We now know that. We didn't really appreciate that before.  
14 They are a part of what 21st Century is doing and what it's up  
15 to. And, additionally, now in the amended complaint a number  
16 of these other entities are now identified by name in the  
17 amended complaint as elements of the scheme and how the  
18 schemes operated. And so for that reason, we think they  
19 become fair game.

20           THE COURT: Is that the same argument about their --  
21 this is your letter at 188, the land and property?

22           MR. MARKS: Yeah. Well, the land and property is  
23 the same argument but a little -- there's also a little bit of  
24 a wrinkle on the -- one additional sort of observation about  
25 the land and property and that is, well, couple of wrinkles.

1 One, keep in mind that one of the ways in which control over  
2 locations is exercised is by having the doctor who operates  
3 that pay rent, okay.

4 THE COURT: That's a more traditional scheme that  
5 you and your -- those who bring these kinds of cases talk  
6 about, right?

7 MR. MARKS: The other thing is that we have, again,  
8 all these supposedly disconnected entities that are supposedly  
9 not related to each other. They're all also paying money in  
10 real estate transactions. Again, same time to the same  
11 people. They're supposedly disconnected and during his  
12 testimony Alishayev could identify what some of them were. He  
13 couldn't identify what others of them were and that's  
14 important.

15 THE COURT: That is the ones that are on the second  
16 page of your letter at 188?

17 MR. MARKS: Yes.

18 THE COURT: NC Systems, [indiscernible].

19 MR. MARKS: It's where we mention -- I think, in our  
20 letter, we mentioned DeKalb Avenue Realty?

21 THE COURT: Yeah, uh-huh.

22 MR. MARKS: Yeah, it's those. So those city  
23 residential properties, Florida Gardens Owner's Corp, in those  
24 instance -- for, example, DeKalb Avenue Realty, it gets  
25 \$48,000. It gets paid by 21st Century, it gets paid by

1 Express Billing, it gets paid by --

2 THE COURT: Forty-right thousand dollars goes out at  
3 about the same time?

4 MR. MARKS: About the same time from four different  
5 entities that are --

6 THE COURT: Your colleagues. Did your colleague  
7 want to say something?

8 MR. COOK: Yeah, they're monthly payments.

9 MR. MARKS: Oh, I'm sorry. They're monthly payments  
10 that add up to \$48,000 and they're from four, separate  
11 entities.

12 THE COURT: Okay. Right.

13 MR. MARKS: And one of which is Personal Tech, an  
14 entity that Alishayev --

15 THE COURT: That's the relative?

16 MR. MARKS: Yes. That, by the way, Alishayev  
17 testifies that was my father. Anything it did I had nothing  
18 to do with, I don't know anything about it. So the fact that  
19 it's making payments that seemed to be coordinated with  
20 entities that he is involved with is potentially significant  
21 because it is, as we allege, a member of this scheme operating  
22 in concert to the existence of common action is relevant, Your  
23 Honor.

24 THE COURT: Okay. What else? Just what else is  
25 remaining?

1 MR. MARKS: I think the only other thing, Your  
2 Honor, that I've missed is cash transactions. So -- and,  
3 again, the response to this is not we don't have any, there  
4 aren't any instances in which we converted funds to cash,  
5 okay. It's that you can't have them which is sort of an  
6 interesting response.

7 But what we have, Your Honor, is cash is obviously a  
8 way in which kickbacks get paid. That is our theory, but  
9 beyond our theory, we actually have a specific instance, at  
10 least one, in which a marketer named Tommy Novakov at the time  
11 it was working for 21st Century receiving payments from a  
12 bunch of these entities, converted about \$200,000 to cash.  
13 When asked at his deposition, Alishayev was asked was this  
14 \$200,000 that Tommy Novakov used to pay kickbacks? Answer  
15 wasn't absolutely not, no way. It was I don't know, okay.  
16 And then you have, at the same time, Khaim and Begiyev, two  
17 new defendants. They're routinely converting money to cash to  
18 an entity called J Payroll Services.

19 So, again, if they've got instances where they're  
20 converting to cash, great, turn them over. And if they're  
21 not, which is what you'd expect from a legitimate business,  
22 it's not -- there's no reason for it to be conducting business  
23 in cash, then, you know, let's see.

24 THE COURT: Okay. So then for defense, again, just  
25 tell me your responses to those but I have these materials.

1 What is still outstanding on your end? I mean if it's  
2 everything and you want to just tell me what you resolved,  
3 that's fine.

4 MR. HORN: What we need from them?

5 THE COURT: Yeah.

6 MR. HORN: A lot.

7 THE COURT: Are you going to respond to them or --  
8 but if you've already said it in your letter, I mean really I  
9 was just asking a question to know if anything had improved in  
10 the last couple of days in terms of what remained outstanding.  
11 So, you know, if you've already put it in the letters, I don't  
12 need -- we don't need to go over it.

13 MR. HORN: Okay.

14 THE COURT: I just want to take out things that  
15 you've dealt with.

16 MR. HORN: There's situations that are going to come  
17 up. Like, for instance, the issue with counsel have discussed  
18 how it's going to work with the depositions.

19 THE COURT: Uh-huh.

20 MR. HORN: The reserved the right to object to the  
21 calling of the actual people who were involved in the  
22 verification. If the -- and I've said, look, if the Rule 36  
23 witness gives me what I need, you know, then I wouldn't need  
24 any witnesses. I, of course, will leave that deposition and  
25 buy a lottery ticket to do that. But so there's still

1 depositions that we -- and all of this is dependent really to  
2 our motion to compel and then that has, obviously, directly  
3 impacts the motion to disqualify.

4 THE COURT: Uh-huh.

5 MR. HORN: So we're kind of stuck -- and I say we, I  
6 think both sides -- as far as our discovery demands of them,  
7 we're kind of stuck in limbo until we receive some guidance  
8 because --

9 THE COURT: Okay.

10 MR. HORN: -- when we received -- you know, they're  
11 going to object. One of the things that Mr. Marks had said  
12 was, you know, when we were talking about privilege and he  
13 also reiterated it now, they've objected to us asking the  
14 State Farm witnesses anything that they knew based on  
15 privilege. So really they're going to say, well, you know,  
16 [indiscernible] and I can't tell you. That's, you know,  
17 attorney/client conversations with the lawyer.

18 THE COURT: Is that not a hearsay? Is that not  
19 true?

20 MR. HORN: It's in their objections.

21 MR. MARKS: That's just -- that's not -- that is not  
22 what we intend to do and that is not what our objections  
23 state. They are certainly -- when they bring our witness in  
24 they're certainly able to ask our witnesses, you know, what  
25 did you rely on, what did you make a decision to pay or deny

1 this claim on and the witnesses are able to answer that  
2 question. What they're not allowed to do is say, you know,  
3 did you -- you know, what legal -- did you have a -- if there  
4 are legal communications with their attorney.

5 THE COURT: I think there's a different question,  
6 probably in between, which is if the attorney communicated  
7 information to the State Farm person and the question is what  
8 did you know, then it doesn't matter if it's a fact and it  
9 came from the lawyer unless somehow you're going to say that  
10 that's something that was part of some attorney work product  
11 and they needed to consult with the State Farm person.

12 But, you know, obviously the drum that defendants  
13 are beating is that State Farm knew a lot and still decided to  
14 pay. And so it's unreasonable for you to be making these  
15 claims, you know, under the rubric of fraud and now RICO.

16 MR. MARKS: And, Your Honor --

17 THE COURT: Unreasonable, unsupportable, et cetera,  
18 et cetera.

19 MR. MARK: And, Your Honor, and that will certainly  
20 be resolved on a question-by-question basis. You're  
21 absolutely right. So under certain circumstances if there is  
22 -- we're not -- we're only going to claim a privilege as to  
23 things that meet the appropriate definition of privilege but  
24 that does not mean that we have to establish reliance, Judge,  
25 if we're going to win our case. So we are going to tender

1 witnesses who are in a position to show that we rely and we're  
2 going to allow inquiry sufficient for them to be able to  
3 address that question.

4 THE COURT: Okay.

5 MR. MARKS: If we can't, that's on us. And if they  
6 ask appropriate questions, they're going to get answers, and  
7 if they don't then that's -- then they can bring it to the  
8 Court's attention on question --

9 THE COURT: Okay. All right. I got it.

10 MR. MARKS: -- just as we --

11 THE COURT: You know, I think that this is -- in  
12 some ways this is going to have to move ahead and test these  
13 issues and if you're not getting any answers then you can  
14 raise the issue and we'll see what should happen in these  
15 depositions.

16 Okay. So basically all of your issues are still  
17 open as described? Nothing's improved? Okay. Oh, well.

18 All right. Let's talk about scheduling. I mean  
19 this is a 2017 case and while the RICO claims are new, we've  
20 been, you know, going on and on and on about this. So I think  
21 the schedule as proposed in yesterday's letter is not  
22 reasonable. I mean 2021, that's like so far ahead. You know  
23 what you need to do. You basically identified the landscape.  
24 I guess what's not clear to me is how much you think each  
25 side, although I guess it's really more for the plaintiffs,



1 how much you think the records are in the custody or control  
2 of the individuals and entities that you've identified or if  
3 you think these are going to be third party or non-party  
4 subpoenas to the banks, to the accountants, to the, I don't  
5 know, the real estate brokers. I mean I don't know, you know.

6           They're moving out to Florida at this point, right,  
7 so, you know, there could be out-of-state discovery which can  
8 take longer. But it seems like you have a general idea of the  
9 landscape here, so you've had a lot of time and, you know,  
10 it's like the last order on this. You should've been doing  
11 stuff for the last several months. So this schedule that goes  
12 to 2021 is not reasonable. So why can this not, you know,  
13 wrap up, discovery-wise in the next six or seven months? I  
14 mean it's just -- come on. We've been at it for a really long  
15 time. Yes?

16           MR. MARKS: So a few things. So, number one, our  
17 ability to address sort of these issues of who owned and  
18 controlled 21st Century and the kickbacks and financial  
19 arrangements really only began once we filed the amended  
20 complaints.

21           THE COURT: It's not true. I mean we're not going  
22 to rehash this, but it's not correct. So you've had, you  
23 know, literally years on general discovery, you've had the  
24 opportunity to push that forward earlier. So that's not  
25 something that I accept as a reason why this case is not

1 further along. But given that you have a sense of the  
2 landscape why is six or seven months not enough time to deal  
3 with this?

4 MR. MARKS: Sure. Okay.

5 THE COURT: You know, with the question how much of  
6 this is coming from parties either outside of the realm of  
7 what's been described or, seriously, there is mention in the  
8 Florida real estate so are we talking about out-of-state  
9 discovery which that can get complicated, et cetera. Go head.

10 MR. MARKS: So, all right, so, Your Honor, so here's  
11 what we anticipate and here's are the reasons why we think we  
12 need the time that we've proposed. One, we do -- the time is  
13 basically built around the idea that we're going to have to  
14 take -- first of all, we've had depositions of the parties,  
15 themselves, okay. There are 14 parties. Now I understand  
16 that some of these parties may be sort of controlled by one  
17 person, right, so [indiscernible].

18 THE COURT: Right.

19 MR. MARKS: But still we have quite a number of  
20 parties. The complaint itself identifies quite a few  
21 additional non-parties, the marketers and consultants.

22 THE COURT: I mean look at this, two- or three-hour  
23 depositions. I mean how did you get into this, what doctors  
24 did you do, who told you to do this, how did they pay you.  
25 I'm not saying it's not a lot of work. I'm saying it's been

1 going on for a long time.

2 MR. MARKS: Well, I agree, Your Honor. I'm just  
3 telling you that there are going to be -- there are going to  
4 be a significant number of depositions of parties and non-  
5 parties. There's going to be a significant -- there's going  
6 to be document discovery that we're going to need from parties  
7 and non-parties.

8 I will tell you that experience suggests that it  
9 takes time to get documents from parties and non-parties  
10 despite their best intentions to respond promptly and quickly  
11 because I suspect we're going to have some fights that end us  
12 back here that will take time. You know, if history's any  
13 indication, I mean it took almost a year to resolve some  
14 discovery and, again, we're not suggesting that long. It took  
15 almost a year to resolve some document discovery issues here  
16 as well and then I will tell you that we've --

17 THE COURT: Well, I mean the caveat -- stop asking  
18 for things you're not going to get. I mean --

19 MR. MARKS: No, no, no.

20 THE COURT: -- move it along.

21 MR. MARKS: Yeah, no, and we -- judge, we've been --  
22 and I will tell you since --

23 THE COURT: Uh-huh.

24 MR. MARKS: -- since the Court ruled on the motion  
25 for leave to amend we have been moving full steam ahead.

1 THE COURT: Okay.

2 MALE: We've taken a lot of depositions. We and  
3 defendants' law firm have been getting along well. We are  
4 moving at great speed, okay. But it's very -- it's been very,  
5 very time-consuming and we're moving at great speed. And I  
6 will tell you that it's our intention to move forward at a  
7 high speed but there is a lot of depositions. There are a lot  
8 of parties and non-parties to documents.

9 And I'll tell you this, Your Honor, the other piece  
10 of this is when you figure into the schedule, and I know this  
11 -- you know, this is sort of extraneous, but you've got --  
12 part of this window is, I feel almost ridiculous saying this,  
13 but I got to put it out there, we're going into December where  
14 we lose time.

15 THE COURT: Yeah, but we lose the summer at other  
16 times.

17 MR. MARKS: I know.

18 THE COURT: I know. I mean look there's a rhythm in  
19 New York, right. Summer ends and we have the Jewish holidays  
20 then we have Thanksgiving then we have Christmas and then  
21 everybody works really hard then we go to Easter and Passover  
22 in school and then summer's here again, right? I mean just  
23 what it is.

24 MR. MARKS: Let me put out one other piece that's  
25 sort of relevant when we think about the schedule and that is

1 -- and, again, we are all going full-speed ahead. I have no  
2 idea whether there is even a potential for settlement. But I  
3 will tell you that the tighter, the schedule the more  
4 difficult it becomes to settle the case and here's why, and  
5 there are reasons why.

6 One is sort of just the practical point of we are  
7 all so busy trying to move this case along and not attend,  
8 really, to anything else we're working on in a short amount of  
9 time. So that's number one. Number two, the more that State  
10 Farm incurs in costs, I'm sure this is true of defendants as  
11 well, the higher the dollar amount goes and the harder it is  
12 for us to come up with numbers that makes sense. That's a  
13 factor. And I'll tell you that in our experience the case has  
14 been getting stronger. I'm sure defendants will disagree. It  
15 makes it harder. So that, too, is a factor as we think about  
16 -- as we think about the schedule and that is relevant to us  
17 as well as we think about the schedule.

18 THE COURT: All right. All right. So let's talk --  
19 well, let me hear from you. You want to move it along?

20 MR. HORN: So, Your Honor, we --

21 THE COURT: Do you want to spend through 2021 on  
22 this?

23 MR. HORN: -- Your Honor, we propose end of paper --  
24 of fact discovery in March, March 2nd. That's what we  
25 discussed with the plaintiffs, that is the disagreement that

1 we had.

2 THE COURT: Uh-huh.

3 MR. HORN: And then similar dates. You know, a  
4 month for initial expert reports, a couple months for the  
5 rebuttals and, essentially, discovery conclusion and it would  
6 -- discovery would be completely concluded by mid-August and  
7 then pre-motion letters to Judge Brodie around a month from  
8 then. That's what we anticipate.

9 I think that some of what counsel says is  
10 inaccurate. I think that a faster schedule, my experience as  
11 a litigator in these cases and others, tends to encourage  
12 settlement whether it's because certain parties -- they can't  
13 sit on documents that they don't want the other side to get  
14 whether that's plaintiffs or defendants. They have to make  
15 the decision now and they make the decision to settle.

16 Costs, with a faster schedule --

17 THE COURT: Yeah, I get it.

18 MR. HORN: -- costs don't drive up as quickly.

19 THE COURT: Okay.

20 MR. HORN: Whereas, if we allow plaintiffs to  
21 meander through half of the bank accounts in New York for a  
22 year, costs are going to go up. So, for that, I am inclined  
23 to agree with the Court. Something -- give us five months,  
24 maybe six months, see where we are then if there is some  
25 compelling need for an extension the Court can make a decision

1 at that time. Whether it's because of there's intransigent  
2 third parties, litigants who don't want to turn everything  
3 over, fights such as about privilege or about the scope of  
4 discovery. If that makes it necessary, we can revisit it at  
5 that time.

6 But until then I think a faster, tighter deadline  
7 would compel everybody to move more quickly and it would also  
8 compel third parties, should they be subpoenaed, to respond  
9 within the deadline and will give plaintiffs some rhetorical  
10 weaponry to pressure third parties to respond and not sit on  
11 things for six months.

12 THE COURT: All right. Look I'm going to give you  
13 the schedule which is pretty close to what you're proposing.  
14 This case was filed in October of 2017. You know, I  
15 understand that RICO has arguably expanded this but that's  
16 been a question since -- really all along. It was a strategic  
17 decision not to bring it as RICO and we've certainly been  
18 talking about RICO for many, many, many months. So if that's  
19 the reason why then it doesn't seem adequate that this has not  
20 moved further on.

21 I appreciate that it's taking a lot of work but, I  
22 mean, it's a big case. It's at least what the defendant's,  
23 sorry, what the plaintiff's saying about the defendant is this  
24 is a, you know, positively, ultimately contained in a bubble  
25 system but it has many small pieces that you want to

1 investigate.

2           So the schedule is as follows: Fact discovery  
3 closes March 31st. That same day expert disclosures from  
4 whoever's moving on the issue should be made. Initial expert  
5 report is due April 30th. The rebuttal report is due June  
6 30th. It really should be the end of discovery. If it turns  
7 out that you need to depose the experts, you could, you know,  
8 talk to me about that but I'm not sure how that's going to go  
9 in this case. Are you going to do the expert discovery -- you  
10 know, one report is produced and then do the deposition and  
11 then do the next report? I don't know. So the end of  
12 discovery, June 30th, the letter to Judge Brody, July 31st and  
13 July pretrial order, August 31st. Now if you need the time to  
14 depose the rebuttal expert, you know, after June 30th, you can  
15 do that. I don't know whether that would affect anything that  
16 has to do with the pre-motion conference letter.

17           All right. So I have all these motions. It may be  
18 that I ask you for, you know, the retainer agreement, if there  
19 is one, or a sample of some of these documents so I can see  
20 what they are with regard to the privilege issue. I don't  
21 know. But we'll rule on these emotions.

22           So settlement. I mean I do get it that if you're  
23 focusing the material, you know, that can be hard to focus on  
24 settlement. On the other hand, you, both, all have litigated  
25 many of these cases. The agreement seemed relatively similar,



1 at least the ones I've seen, and it's really about numbers and  
2 then, you know, maybe there's some difference about now do you  
3 continue in the business, what's your position with regard to  
4 that, but it's not really that different. It's usually about  
5 dollars.

6           So, you know, maybe you need to do some more this  
7 discovery to get a better handle on how strong or weak,  
8 whichever way you want to go, on a particular issue and  
9 particular exposure for any given defendant. Now there are  
10 more defendants they may fee differently about this. Some of  
11 them are new. I don't know how much, you know, to the extend,  
12 in quotes, they are shell companies. They may not be a  
13 [indiscernible] there. Nobody gives a hoot about it.

14           But, anyway, I mean you get a better overview and  
15 you can make a decision about whether you want to have  
16 settlement discussions. If you're close to settling then, you  
17 know, that might be a reason to extend this. Certainly I  
18 acknowledge things can happen and that might meet the good-  
19 cause standard but, you know, this is a schedule of two and-a-  
20 half years on a case. It's enough. Yes?

21           MR. HORN: The only issue we have is, from my point  
22 of view, we're kind of waiting to know what we can get before  
23 we drive forward. So, you know, I feel like we're kind of --  
24 we're wearing handcuffs because we don't know and, ultimately,  
25 the issue then leads directly to the disqualification issue.

1 THE COURT: Uh-huh.

2 MR. HORN: Because we may want their depositions.

3 THE COURT: Yeah. I don't know about that one but  
4 we'll see. I don't know.

5 MR. HORN: You know, because it's 500 documents I  
6 haven't seen and I know they were involved, for six years, on  
7 an investigation long before it ever became a litigation. So  
8 it becomes a real problem.

9 THE COURT: Uh-huh. Okay. Anything else?

10 MR. MARKS: Should we anticipate, should we set  
11 another status at some point, Your Honor --

12 THE COURT: I mean we'll do it.

13 MR. MARKS: -- just to check in at some point  
14 because, look, I suspect -- I have a feeling we'll go with the  
15 Court's schedule. That will require one of the things that  
16 Mr. Bowers said in our conference was that -- I said are we  
17 going to have a lot of objections to our discovery? He said I  
18 intend to promptly and quickly comply and I look forward to  
19 that and if that's the case then all things will be smooth  
20 sailing. If we don't get prompt and quick compliance then,  
21 you know, we'll have to ask the Court's help to keep  
22 defendants to the schedule. So does it make sense to set a  
23 status or --

24 THE COURT: Well, we'll -- let me decide these  
25 motions and see what the schedule looks like and go from

1 there.

2 MR. MARKS: All right. We'll leave it to the Court  
3 then.

4 THE COURT: Yeah. I mean, look, in general I've  
5 given -- when you've had these motions you've put in a lot of  
6 briefing. The quicker way to do this is to raise these issues  
7 with really simple letters. Come in here and just tell me  
8 about it or have telephone conferences, you know, if you think  
9 that the briefing of the discovery issues is taking too much  
10 time, especially if you're on a more expedited schedule.

11 So, all right. Anything else? You know, the  
12 settlement in general I would offer, you know, we could have a  
13 settlement conference, you could use the court mediation  
14 service. I just know that you all have been at this as long a  
15 the privilege log -- that was funny when you said 2011 because  
16 I became magistrate judge in 2012 and I think my first case  
17 was -- I feel like yep, we've been doing this a long time.

18 UNIDENTIFIED SPEAKER: Yeah.

19 THE COURT: So like if you think there's something  
20 that could help move settlement forward, you know, let me  
21 know. Sorry. The last question before we go. What do you  
22 want to do? Do you want to still proceed with the motion to  
23 dismiss? Will turn into a motion for summary judgment.

24 MR. HORN: At this time, yes. If I change my mind  
25 I'll let counsel know and the Court know immediately.

1 THE COURT: Okay.

2 MR. HORN: I do want to speak with my client before  
3 I make that kind of decision.

4 THE COURT: Okay. All right. Thank you.

5 MR. HORN: Thank you, Your Honor.

6 THE COURT: All right. Take care.

7 (Proceedings ended at 10:50 a.m.)

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1 I certify that the foregoing is a court transcript from  
2 an electronic sound recording of the proceedings in the above-  
3 entitled matter.

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5 \_\_\_\_\_  
6 Shari Riemer, CET-805

7 Dated: October 9, 2019  
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